

A Danaharta Urus Sdn Bhd v Safri bin Nawawi & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D8–22–1137
OF 2004

B KANG HWEE GEE J
3 SEPTEMBER 2008

C *Civil Procedure — Summary judgment — Appeal — Liability of guarantors —
Leave to defend — Whether sums owed by defendants as guarantors clearly
computed*

D The parties to the original loan were Bank Bumiputra Malaysia Bhd
(‘BBMB’) and Safire Pharmaceuticals (M) Sdn Bhd (‘the borrower’). The first
and second defendants had provided joint and several guarantees to guarantee
this loan. Subsequently the plaintiff had purchased the loan and the
guarantee from BBMB, under s 13 of the Pengurusan Danaharta Nasional
E Berhad Act 1998 (‘the Act’). According to the statement of account and the
certificate of indebtedness the debt that was originally outstanding from the
borrower was RM51,864,490. When the borrower failed to make payment
on the loan the plaintiff issued a demand to the guarantors. When the
guarantors also failed to pay, the plaintiff appointed special administrators to
F sell the shares of the borrower in order to realise the assets of the borrower and
pay off the creditors. Under s 25 of the Act, the plaintiff had the power to
appoint special administrators to administer the borrower company if certain
conditions are satisfied. In the present case the plaintiff relied on the fact that
the borrower was unable to pay its debts as the reason for appointing special
G administrators. The special administrators prepared a workout proposal for
the sale of the assets of the borrower by way of the sale of its shares. The sale
of the shares, which was by way of a public tender exercise received only one
bid from Pharmaniaga Bhd. The special administrators managed to realise the
sum of RM20m from the sale of the shares to Pharmaniaga Bhd. From this
H RM20m the special administrators paid the sums due to the essential
creditors, who were entitled to priority in payment, before payment to the
plaintiff as secured creditor. After paying the essential creditors the special
administrators were left with a sum of RM17,226,618.74 which was used to
reduce the borrower’s loan from RM51,864,490 to RM34,637,871.26. In
I reliance on the joint and several guarantees of loan given by the defendants
to BBMB and which were subsequently acquired by the plaintiff, the plaintiff
brought an action against the defendants for the recovery of the sum of
RM34,637,871.26, being the outstanding loan amount, with interest at
8%pa from an arbitrary date fixed at 20 days after receiving the

RM17,226,618.74. Thereafter the plaintiff applied for and obtained summary judgment for the sum of RM34,637,871.26 against the defendants. These were the defendants' appeals against the decision allowing the plaintiff's application for summary judgment. It was the first defendant's contention that the statement of accounts provided by the plaintiff were inadequate because they did not show how the amount due and owing was arrived at. Further, the first defendant submitted that there was a substantial variation between the original arrangement with respect to the guarantee and indemnity and the subsequent arrangement between the plaintiff and the defendants; that the accounts in respect of this arrangement were not given to the defendants; and that the amount of the purchase price of the loan from BBMB was not given to the defendants. The second defendant also submitted that the certificate of indebtedness which was the one document that can clearly show the liability of the defendants was in itself not accurate because there was a shortfall of RM4,490 on the face of the certificate and because it did not show the sum of RM9m, which it was due to be collected from Pharmaniaga. In reply the plaintiff contended that the sum of RM17,226,618.74 was the net sum after the special administrators had paid the essential creditors and that the further sum of RM9m was not due from Pharmaniaga but from the pre-existing creditors of the borrower. The issue to be determined in these appeals was whether summary judgment ought to have been entered.

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Held, allowing the appeals with costs:

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- (1) The statement of claim did not specify clearly how the sums owed by the defendants as guarantors came to be computed. Instead it merely referred to a statement of account and workout proposal which one had to work through to determine the sums owed. Generally leave to defend should be given where there is reasonable ground for an enquiry or account in order to ascertain the amount recoverable (see para 6(1)).
- (2) The plaintiff could not rely on the finality certification clause in the guarantee because the said guarantee was between the guarantors and BBMB. The amount certified would have to include amounts incurred after the loan was purchased by the plaintiff, which was not within the contemplation of the parties when they signed the letters of guarantee and indemnity (see para 6(2)).
- (3) The defendants should be granted leave to defend as they had satisfied the court under O 14 r 3 of the RHC that 'there was some other reason to be a trial of the claim'. When the defendants accepted joint and several liability as guarantors of the loan given to the borrower by BBMB, they would not have contemplated that the loan would be statutorily acquired by the plaintiff and thereafter managed by the

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- A special administrators. Although the plaintiff could rely on s 55 of the Act to support its acts, this section did not exempt the plaintiff from justifying the transactions that it had undertaken after its acquisition to provide a complete and detailed account of how the sum of RM34,637,871.26 was arrived at. The technical and complicated nature of the defendants' liability could not be explained and understood from the brief statement of account provided by the plaintiff. As such a full trial would be required to explain how the sum claimed was arrived at (see para 8).

C **[Bahasa Malaysia summary]**

- Pihak-pihak kepada pinjaman asal adalah Bank Bumiputra Malaysia Bhd ('BBMB') dan Safire Pharmaceuticals (M) Sdn Bhd ('peminjam').
- D Defendan-defendan pertama dan kedua telah memberikan gerenti-gerenti bersama dan berasingan kepada penggerenti pinjaman ini. Berikutan itu plaintif telah membeli pinjaman dan gerenti daripada BBMB, di bawah s 13 Akta Pengurusan Danaharta Nasional Berhad 1998 ('Akta'). Menurut penyata akaun dan sijil keberhutangan hutang asal yang tertunggak daripada
- E peminjam adalah RM51,864,490. Apabila peminjam gagal untuk membuat bayaran ke atas pinjaman itu plaintif telah mengeluarkan tuntutan kepada penggerenti-penggerenti. Apabila penggerenti-penggerenti juga gagal membayar, plaintif telah melantik pentadbir-pentadbir khas untuk menjual saham-saham peminjam bagi tujuan merealisasikan aset-aset peminjam dan
- F melangsaikan hutang dengan pemiutang-pemiutang. Di bawah s 25 Akta, plaintif mempunyai kuasa untuk melantik pentadbir-pentadbir khas bagi mentadbir peminjam syarikat jika syarat-syarat tertentu dipenuhi. Dalam kes ini plaintif bergantung kepada fakta bahawa peminjam tidak mampu membayar hutangnya sebagai alasan melantik pentadbir-pentadbir khas.
- G Pentadbir-pentadbir khas tersebut telah menyediakan cadangan penyelesaian untuk jualan aset-aset peminjam melalui jualan saham-sahamnya. Jualan saham-saham itu, melalui pelaksanaan tender awam hanya menerima satu bidaan daripada Pharmaniaga Bhd. Pentadbir-pentadbir khas berjaya merealisasikan jumlah RM20 juta daripada jualan saham-saham kepada
- H Pharmaniaga Bhd. Daripada RM20 juta ini pentadbir-pentadbir khas itu membayar jumlah yang perlu dibayar kepada pemiutang-pemiutang yang penting, yang berhak mendapat keutamaan pembayaran, sebelum pembayaran kepada plaintif sebagai pemiutang bercagar. Selepas membayar pemiutang-pemiutang yang penting pentadbir-pentadbir khas mempunyai
- I baki berjumlah RM17,226,618.74 yang digunakan untuk mengurangkan pinjaman peminjam daripada RM51,864,490 kepada RM34,637,871.26. Bergantung kepada gerenti-gerenti bersama dan berasingan pinjaman yang diberikan oleh defendan-defendan kepada BBMB dan yang kemudiannya telah diperolehi plaintif, plaintif telah memulakan tindakan terhadap

defendan-defendan untuk pemulangan jumlah RM34,637,871.26, yang merupakan jumlah yang belum dijelaskan, dengan faedah pada kadar 8% setahun dari tarikh arbitrari ditetapkan pada 20 hari selepas menerima penghakiman terus untuk jumlah RM34,637,871.26 terhadap defendan-defendan. Berikut adalah rayuan-rayuan defendan-defendan terhadap keputusan membenarkan permohonan plaintif untuk penghakiman terus. Defendan pertama berhujah bahawa penyata-penyata akaun yang diberikan oleh plaintif tidak mencukupi kerana tidak menunjukkan bagaimana mendapat jumlah yang patut diberikan dan belum dijelaskan. Selanjutnya, defendan pertama menghujahkan bahawa terdapat perbezaan besar antara urusan asal berkaitan gerenti dan indemniti dan urusan selanjutnya antara plaintif dan defendan-defendan; bahawa akaun-akaun berkaitan urusan ini tidak diberikan kepada defendan-defendan; dan bahawa jumlah harga belian pinjaman daripada BBMB tidak diberikan kepada defendan-defendan. Defendan kedua juga menghujahkan bahawa sijil keberhutangan yang merupakan satu-satunya dokumen yang boleh menunjukkan dengan jelas liabiliti defendan-defendan dengan sendirinya tidak tepat kerana terdapat kurangan RM4,490 pada sijil tersebut dan kerana ia tidak menunjukkan jumlah RM9 juta, yang perlu diambil daripada Pharmaniaga. Dalam jawapan plaintif menghujahkan bahawa jumlah RM17,226,618.74 adalah jumlah bersih selepas pentadbir-pentadbir khas telah membayar pemiutang-pemiutang yang penting dan bahawa jumlah selanjutnya sebanyak RM9 juta itu tidak perlu diambil daripada Pharmaniaga tetapi daripada pemiutang-pemiutang peminjam yang sedia ada. Isu yang perlu ditentukan dalam rayuan-rayuan tersebut adalah sama ada penghakiman terus patut dimasukkan.

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Diputuskan, membenarkan rayuan-rayuan dengan kos:

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- (1) Penyata akaun tidak memperincikan dengan jelas bagaimana jumlah-jumlah yang belum dijelaskan oleh defendan-defendan sebagai penggerenti-penggerenti dikira. Sebaliknya ia hanya merujuk kepada penyata akaun dan cadangan penyelesaian yang memerlukan seseorang itu membuat pengiraan untuk menentukan jumlah yang belum dijelaskan. Pada amnya kebenaran membela sepatutnya diberikan di mana terdapat alasan munasabah untuk siasatan atau keterangan bagi tujuan memastikan jumlah yang boleh didapatkan kembali (lihat perenggan 6(1)).
- (2) Plaintif tidak boleh bergantung kepada kemuktamadan fasal perakuan dalam gerenti kerana gerenti tersebut adalah antara penggerenti-penggerenti dan BBMB. Jumlah yang diperakui hendaklah termasuk jumlah-jumlah yang ditanggung selepas pinjaman itu dibeli

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- A oleh plaintiff, yang tidak dijangka oleh pihak-pihak apabila mereka menandatangani surat-surat gerenti dan indemniti (lihat perenggan 6(2)).
- B (3) Defendan-defendan sepatutnya diberikan kebenaran membela kerana mereka telah memuaskan mahkamah di bawah A 14 k 3 KMT bahawa 'there was some other reason to be a trial of the claim'. Apabila defendan-defendan menerima liabiliti bersama dan berasingan sebagai penggerenti-penggerenti pinjaman yang telah diberikan kepada peminjam oleh BBMB, mereka tidak mungkin menjangkakan bahawa pinjaman itu akan diperoleh secara statut oleh plaintiff dan kemudian diuruskan oleh pentadbir-pentadbir khas. Meskipun plaintiff boleh bergantung kepada s 55 Akta tersebut untuk menyokong tindakan-tindakannya, seksyen ini tidak mengecualikan plaintiff daripada menjustifikasikan transaksi-transaksi yang telah dilakukannya selepas pemerolehannya untuk memberikan keterangan yang lengkap dan terperinci tentang bagaimana boleh mendapat jumlah RM34,637,871.26 tersebut. Liabiliti defendan-defendan yang bersifat teknikal dan rumit tidak boleh dijelaskan dan difahami daripada penyata akaun yang dikemukakan oleh plaintiff. Oleh itu perbicaraan penuh adalah perlu untuk menjelaskan bagaimana boleh mendapat jumlah yang dituntut (lihat perenggan 8).]
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Notes

- F For cases on appeal, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6883–7049.

Cases referred to

- G *Bank fur Gemeinwirtschaft Aktiengesellschaft v City of London Garages Ltd & Ors* [1971] 1 WLR 149, CA (refd)

Legislation referred to

- H Pengurusan Danaharta Nasional Berhad Act 1998 ss 13, 55
Rules of the High Court 1980 O 14
- H *Adrian Hii (Shook Lin & Bok) for the plaintiff.*
R Jegatheesa (RJ Esa & Co) for the first defendant.
Pushpam Subramaniam (Pushpam & Co) for the second defendant.

Kang Hwee Gee J:

- I [1] Enclosure 245 is an appeal by the first defendant against the decision of the senior assistant registrar in allowing the plaintiff's application for summary judgment against the first defendant.

[2] Enclosure 246 is an appeal by the second defendant against the decision of the senior assistant registrar in allowing the plaintiff's application for summary judgment against the second defendant. A

[3] The plaintiff's claim against the defendants is in respect of a joint and several guarantees which they gave to the plaintiff to guarantee the loan taken by Safire Pharmaceuticals (M) Sdn Bhd the third defendant in the counterclaim. B

[4] Originally the loan was granted by Bank Bumiputra Malaysia Bhd to the borrower. Subsequently it was purchased by Danaharta Urus Sdn Bhd under s 13 of the Danaharta Act 1998 including the present guarantee now in contention. C

[5] The relevant provisions in the joint and several guarantees which bind the guarantors and relied upon by the plaintiff in the O 14 application for summary judgment before the registrar reads as follows: D

1.1 The Guarantor/Guarantors hereby unconditionally and irrevocably guarantee as principal debtor(s), jointly and severally, and not merely as surety(ies) to pay and satisfy the Bank on demand: E

(a) in full all monies which are owing and payable by the Borrower(s) to the Bank under the Loan Agreement or such amount thereof as may be outstanding, whether certain or contingent now or hereafter owing as incurred to the Bank from or by the Borrower including all the interest, costs and charges described hereunder (hereinafter collectively referred to as 'the Indebtedness'); F

2.(p) Conclusive Evidence

That a written statement from the Bank as to the amount due and owing by the Borrower shall be accepted by the Guarantor/Guarantors as conclusive evidence that the amount thereby appearing is due from the Borrower(s) to the Bank and payable on demand to the Bank by the Guarantor/Guarantors; G

Mr R Jegatheesa for the first defendant: (verbatim) H

(1) The Statement of Claim of the plaintiff does not disclose the cause of action. What the plaintiff is actually saying is 'I suffered so much loss' and throws it to the court to award damages without any evidence of the loss. See *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 16 TLR 177. I

(2) Also which particular provision of the guarantee the first and second defendants are in breach of is not set out in the Statement of Claim.

- A** (3) There was no demand for the payment of the guarantee in this case. We required the notice of the demand, this being on demand guarantee.
- B** (4) Clause 1.1(a) of the joint and several guarantees — ‘owing as incurred to the Bank from or by the Borrower’ requires the plaintiff to show the statement of account at least to prove that such and such an amount was owed. This was not done. We have asked of it many times. The Conclusive Evidence Clause is defective says it must be from a bank officer but in this case by Danaharta a statutory body.
- C** See Enclosure 7 Exhibits ‘DUSB-7’ and ‘DUSB-8’. The certificate is undated although it states the amount due as at 30.4.2004. The statement of account provided by the plaintiff is inadequate. It does not show purchase by Danaharta. It does not show how much Dr Hamimah the second defendant had paid but is not reflected in the account.
- D**
- E** (5) The business of Safire was destroyed by the plaintiff in taking over the shares of the defendants at a minimal value. They also sold the business of the company to a competitor Pharmaniaga Pharmaceutical Berhad at a sum of RM20 million. There is a duty of care expected of a special administrator under Section 32. He is an agent of the affected person Safire in this case. In this case he was to look after Safire. The special administrators did not consider the fact that there were guarantors and that they owe a duty to them. There was a disposal of assets of Safire and they would be in the same position of the company. See *Standard Chartered Bank Ltd v Walker & Anor* [1982] 3 All ER 938.
- F**
- G** (6) The plaintiff is not in a position to return the securities to Safire even if payment is made under the guarantee and indemnity.
- (7) The Danaharta Act came into force after the guarantees were executed and the guarantors are not protected. Pharmaniaga bought over Safire because Safire was like a jewel sought after by many competitors in the pharmaceutical industry because Safire was under an adoption scheme. This adoption scheme means Safire was under the Ministry of Finance through the Ministry of Health.
- H**
- I** (8) There is a substantial variation between the original arrangement with respect to the guarantee and indemnity and the subsequent arrangement between the plaintiff and the defendants. The accounts were not given. The amount of the purchase price has not been given to us.
- (9) Safire was an ongoing company and there was no reason to come into the company and take over in the manner which the plaintiff did.

- (10) Before this takeover there were serious discussions between the major shareholders of Safire and the plaintiff all of which are reflected in the affidavit evidence. The major shareholder of Safire is PKNP, investment arm of SEDC, and they have not been brought in as a party.

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Miss Pushpam for the second defendant: (verbatim)

- (1) The Statement of Claim by paragraph 4 it is clear that is not only as guarantors and indemnors but also as principal debtors. If they are principal debtors statement of accounts must be furnished, and also the purchase price of Safire by the plaintiff from Bank Bumiputra Malaysia Bhd, the original bank that loan amount. The certificate of indebtedness which had been presented with respect to the Order 14 is defective on the face of it.
- (2) In so far as they are treated as principal debtors then it is incumbent for the plaintiff to have realised that one of the reasons that the plaintiff appointed special administrators under Section 25, more particularly (b) that the survival of the primary affected person and the whole or any part of its assets as a going concern may be achieved; and (c) a more advantageous realisation of the primary affected person's assets may be achieved than on a winding up. The special administrators did not carry out their duties as agents for their guarantors because they are in breach of their trust.
- (3) The purchase of the shares pursuant to the workout proposal was RM20 million. At paragraph 15 of the Statement of Claim states that they had only collected RM17,226,618.74 pursuant to the Workout Proposal and they say the proposal was implemented on 15 September 2003. See Subscription Agreement Tab 11 of Chronology of Events paragraph 5 — Consideration and payment. Danaharta should have collected all the monies at the specified time. The third sum of RM18 million must be paid over by them. It has a right to terminate the sale by tender, if they did not terminate. My client the second defendant paid on the 26.6.2003 a redemption figure amounting to RM29 million to Danaharta, the plaintiff.
- (4) The Statement of Claim is defective on the face of it and the plaintiff cannot seek to use intrinsic evidence either by way of affidavit and or otherwise. Therefore why did the plaintiff not accept the sum of RM26 million as offered by my client the second defendant on behalf of Safire to redeem the said company Danaharta. See letter from the plaintiff to the second defendant on 8.7.2003. This letter did not state that the RM29 million has already been given to the plaintiff in the form of bank draft. However, all it states is they are looking at her

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- A proposal and that they will revert to her later at the date when the monies were given. It was good money and good tender and Danaharta has a duty to accept this money because the tender exercise was more than six months. The subscription agreement states it was valid for six months unless a further extension is given.
- B (5) I also cross reference to the subscription agreement at 5.2 together with the Statement of Claim which indicates our point that the plaintiff could have terminated the tender exercise and could have allow her to redeem Safire.
- C (6) It is our contention that the plaintiff wanted to hand over Safire to Pharmaniaga in order to achieve the target that Pharmaniaga should hold both the adoption scheme bumiputra companies i.e. Safire the second defendant company and remedy which Pharmaniaga already held.
- D (7) Danaharta in the appointment of their officers can be sued and that is why we filed our counterclaim.
- E *Mr Adrian Hii for the plaintiff: (verbatim)*
- (1) The judgment that we obtained is for the sum of RM34,637,871.26. This is derived from the debt of Safire to Bank Bumiputra in the sum of RM51,864,490. Against this sum is to be deducted the sum of RM17,226,618.74. This is the sum that was realized by the special administrators from the sale of the shares of the borrower pursuant to the special administrators exercising their power under the Danaharta Act. The plaintiff has waived any interest accrued and had restricted this claim to the sum of RM34,637,871.26 with interest at 8% per annum from an arbitrary date fixed at twenty days after we received the RM17,226,618.74.
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- G (2) Untrue that Statement of Claim does not plead the cause of action. All the material facts have been pleaded in the form required by the Rules of the High Court 1980 that is to say that the contract of guarantee, that the borrower had failed to make payment that demand was issued to the guarantors and the guarantors had failed to pay.
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- I (3) There was a demand to the guarantors and this is in Enclosure 7 Exhibit 'DUSB-6' page 321.
- (4) Enclosure 7 page 145 Clause 12.1 of the Loan Agreement provides that in the event of default the Bank shall have the right to exercise the powers under the Security Documents including pursuing all

- remedies under the Security Documents. In the event of default under Clause 12.1 the repayment of sum becomes immediately due. A
- (5) Certificate of Indebtedness as well as the statement of account show that the debt that is originally outstanding is RM51,864,490 which was the amount acquired from Bank Bumiputra and this sum is verified in the Workout Proposal that was prepared by the special administrators. The statement of account also reflects all the payments RM17,226,618.74 received by the plaintiff from the special administrators. Evidence of the payment of RM17,226,618.74 is produced in the affidavit. The certificate of indebtedness is binding as there is no manifest error. See *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 and another case *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363. (Onus on the defendants to show manifestos). B C
- (6) There is no conspiracy to sell the assets under value. The special administrators were appointed and they prepared a Workout Proposal for the sale of the assets of the borrower by way of the sale of its shares in order to realise the assets and pay off the creditors. The sale of the shares was by way of public tender exercise which was advertised nationally. In the end only one bid was received from Pharmaniaga Bhd. See advertisement Exhibit 'SN-15' Enclosure 47 for advertisement in the New Straits Times. D E
- (7) The fact that the Danaharta Act came into force after the security is effected should not affect the position of the defendants who are still bound by its provision. F
- (8) The defendants are not discharged by the variations of the terms of the loan vis-a-vis the borrower on account of Clause 2(c) and 2(aa) of the guarantee which provides that the Bank may without discharging the guarantors' liability, vary, add to or alter the provision of the loan agreement. G
- (9) The financial statement in the workout proposal in Enclosure 7 page 230 clearly shows that the borrower was insolvent at that time for example as at year ended 1999 the liability exceeded the assets by RM15 million. H
- (10) Regarding the proposal made by the shareholder PKNP to restructure the loan there were various proposals made. The debt was about RM50 million and the plaintiff was prepared to accept about RM30 million but PKNP a shareholder was prepared to pay about RM25 million and therefore there was no settlement. I
- (11) With regard to the contention that the defendants are principal debtors they are only deemed to be principal debtors for liability but

- A** they are not in status a principal debtor which is the borrower. Therefore there is no basis to the contention that the statement of account should be furnished to the defendants. There is no merit to the contention that the plaintiff must disclose the price at which it purchased the non-performing loan from Bank Bumiputra. The price is irrelevant to this action.
- B**
- (12) With regard to the contention that the borrower is a viable entity and should not have been acquired there is no merit in this because the borrower remains insolvent as shown by its financial statement and was unable to pay its debt.
- C**
- (13) The contention that only RM17,226,618.74 was paid by Pharmaniaga is incorrect. The purchase price at which Pharmaniaga agreed to pay to subscribe to the shares of the borrower was RM20 million which was to be paid to the special administrators. This sum has been paid to the special administrators but out of this sum a certain amount would have been paid to the essential creditors which are defined in the workout proposal who are entitled to priority in payment before payment to the plaintiff as secured creditor. There is no basis to the contention that the shares subscription agreement should have been terminated by the special administrators for failure of purchaser Pharmaniaga to pay the full purchase price.
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- E**
- (14) With regard to the RM29 million cheque that was paid by the second defendant this was received on 26.6.2003 and paid to the plaintiff. The plaintiff issued a letter dated 8.7.2003 to the second defendant saying that her proposal was under evaluation. On 10.7.2003 Pharmaniaga had informed the special administrators that there were 10 promissory notes issued purportedly by Safire and guaranteed by Pharmaniaga Logistics Sdn Bhd which were in relation to the cheque issued by the second defendant. The special administrators confirmed that they have not authorised the promissory notes and they lodged a police report. On 16.7.2003 the police took the bankers cheque that was issued by the second defendant and has charged the second defendant for money laundering. The proposal could not have been accepted in any case because on 24.5.2002 the special administrators have accepted the bid from Pharmaniaga Bhd at RM20 million and the share subscription agreement was on 4.9.2002.
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- I** (15) The plaintiff had purchased from Bank Bumiputra the following items as described from (a) — (j) in the Schedule to the Vesting Certificate in Enclosure 7 Exhibit 'DUSB-3' acting under Section 13 read with 14. Under Section 25 the power to appoint special administrators to administer the borrower if the corporation is satisfied —

- (a) that the primary affected person — A
 - (i) is unable or likely to be unable to pay its debts; or
 - (ii) is unable or likely to be unable to fulfil its obligations to its creditors. B
 - (b) the survival of the primary affected person and the whole or any part of its assets as a going concern may be achieved; B
 - (c) a more advantageous realization of the primary affected person's assets may be achieved more than on a winding up; or C
 - (d) the appointment may achieve a more advantageous realisation or a more expeditious settlement of a duty or liability owed by any person to the Corporation or any subsidiary of the Corporation, whether future, present, vested or contingent. D
- 16 There is a counterclaim by the defendants against the plaintiff and the fact that there is one does not preclude the plaintiff from obtaining judgment on its claim without affecting the right of the defendants to pursue their counterclaim separately. See *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perakayan Sdn Bhd & Ors* [1993] 2 MLJ 76 per Abdul Hamid Omar LP at page 92: The dismissal of the bank's counterclaim in respect of the sum owing by the first respondent to the bank on the overdraft facility on the ground that the bank was in breach of contract in recalling the overdraft prematurely cannot be justified. The bank's claim for recovery of the loan was an entirely separate matter from the first respondent's claim for damages against the bank. There is no ground in law for exempting the first respondent from liability to repay the loan. E
- Reply by Mr R Jegatheesa: (verbatim)* F
- (1) There are basic differences between *Mae Perakayan's* case, supra, and our case. In our case, we say — G
- (i) There was no recall or demand of the loan upon the purported default by the plaintiff in this case. H
 - (ii) The amount purportedly pay to purchase the loan or guarantees from the bank has not been disclosed by the plaintiff. In fact the plaintiff has acted with a lot of stealth and secrecy. It is only during the course of this proceeding that we came across the so called Workout Proposal and the subscription agreement. I
 - (iii) In the *Mae's* case there was a full trial and decision was made after the hearing of the parties.

- A** (iv) The plaintiff has acted in bad faith from the date of acquisition that is May 1999 when the vesting order was put there. They transferred the facilities under the agreement. The facilities are securities for redemption.
- B** (v) The plaintiff would be unable to return the securities which they took including Safire which was the jewel of the pharmaceutical industry.
- C** (vi) Exhibits 'DUSB-7' and 'DUSB-8' of Enclosure 7 — in the *Mae's* case there was no dispute of the amount. In our case a manifest error in the face of our record and it cannot be corrected by affidavit evidence if we used the conclusive evidence clause. The plaintiff seems to have selected the time period in the statement of account. It is a selective time period not the time period from the period of acquisition in May 1999 until the proceeding was filed.
- D** 'DUSB-7' and 'DUSB-8' must be read together because 'DUSB-8' contains the amount that is stated in 'DUSB-7'. Again I must point out that the purchase by the 'DUSB' is not reflected in the statement. There must be transparency.
- E** (vii) The plaintiff has given a release to Safire by selling the shares and business of Safire to Pharmaniaga. Therefore the plaintiff cannot reserve its right against the guarantors. See *Webb v Hewitt* 3 K & J 438, 1181. The creditor gives a release in this case. He cannot reserve the right against the guarantors because the depth is gone in law. That's what *Webb's* case demonstrates as far as the guarantors are not affected persons under the Act. But see Section 87 of the Contracts Act 1950. As Safire is released the guarantors are released also.
- F**
- G** (viii) Unlike the *Mae's* case the borrower Safire is not a party in our case. In the *Mae's* case the borrower was a party.
- (ix) The Safire at all material times an ongoing company. The onus is on the plaintiff to prove otherwise.
- H** (x) There was a series of correspondence and discussion between the bank and the plaintiff before the vesting. Although the plaintiff acknowledges the strength the plaintiff says we are not entitled to these documents. Just like they say about their account.
- I** (xi) The discussion between PKNP and the plaintiff. Reference may be made to Exhibits 'SN-2' to 'SN-10' of Enclosure 47. The essence of the series of correspondence between PKNP and the plaintiff is set out in these documents and the last offer that was made by PKNP was something like RM22.06 million. At the same time there was another valuation report done by Ernest and Young for

RM15 million. This was not disclosed by the plaintiff yesterday. And if RM15 million was offered there would be no necessity to proceed with the purported auction. In fact in 'SN-10' PKNP has offered the redemption sum of RM26,432,988.94 but this was refused as the plaintiff was more interested in selling the shares of Safire.

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(xii) The Consultancy Services Agreement is Exhibit 'SN-17'. It is made between the plaintiff's principal and a consultancy firm KPMG. This consultancy firm entered into an agreement with the plaintiff's principal prior to the vesting order. The special administrators were appointed from KPMG under this agreement and not under the Act as alleged. There was misconduct in this letter because the sale of the product of Safire was sufficient to pay off what debts were due if any. But the special administrators did not take the initiative to attend to this even though they were agents of the guarantors.

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(xiii) The purpose of Workout Proposal is to set forth the special administrators' plan with respect to the affected person. In this case the modified Workout Proposal is dated 25.10.2002 although the special administrators were appointed on 8.11.2001 under the Consultancy Services Agreement. The workout proposal is not as was envisaged by the Act. What was made available in the course of proceeding is a worked out proposal. Another way of putting is it was already decided what should be done. So the Safire was not even consulted and it went on according to schedule and cronies.

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(xiv) The subscription agreement was dated 4.9.2002. The so called Workout Proposal is dated 25 October 2002. In other words we can see from the date the Workout Proposal was after the subscription agreement. So it could not have been in the plan of action. A peculiarity in the workout proposal is that the parties have prepared the documents and are undeniably KPMG which I mentioned earlier and they have sought power under the Disclaimer Clause, see page 250 of Enclosure 7.

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(xv) Capital Reduction — 50 shares were transferred to Pharmaniaga for RM50.00. This is grossly under valued for what it is worth. The guarantors and PKNP refused to accept. See Exhibit 'SN-16' of Enclosure 47. The previous shareholders returned the documents to the plaintiff.

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(xvi) Plaintiff has not stated its claim accurately or clearly and that is one of the requirements in the case quoted by my learned friend at page 4 of the Bundle of Authorities in *The Gold Ores Reduction Company, Ltd v Parr* [1892] 2 QB 14 quoted in the *National*

- A *Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 for the purpose of the Order 14 application the statement of case must be complete and good in itself; any defect or omission cannot be corrected or supplemented by the plaintiff's affidavit.
- B (xvii) There are triable issues for consideration of this Honourable Court. What constitutes some other reasons depend on the facts and certain circumstances on this particular case. See Order 14 rule 3 of the Rules of the High Court 1980.
- C (xviii) My final contention is that I have demonstrated the plaintiff has not even satisfied the preliminary requirements under rule 2 of Order 14 of the Rules of the High Court 1980 and therefore has failed to establish a prima facie case. It is inappropriate to disallow our appeal as there are triable issues intertwined with the counterclaim. The suit must be set out for trial in the interest of
- D justice.

Reply by Miss Pushpam for the second defendant: (verbatim)

- E (1) The plaintiff has failed to show in the Statement of Claim that the exact amount which ought to have been claimed is RM51.86 million. In the Statement of Claim the plaintiff has alleged that they have only collected RM17,226,618.74. In the submission it has been submitted that there is a further RM9 million which should have been paid by
- F the tenderer. No accounts have been furnished to indicate as to what happened to this RM9 million, by their own admission.
- G (2) In the premises the shortfalls appeared to be a sum of RM2,773,311.83 plus a further sum of RM9 million as per the admission. Therefore the total purchase price appears to be RM29 million as has been admitted.
- (3) The claim as indicated in the Statement of Claim is RM51.86 million.
- H (4) The Certificate of Indebtedness as exhibited in 'DUSB-8' is a sum of RM34,637,871.26 as at 30th April 2004. Should the figure as claimed in the Statement of Claim be deducted there is a shortfall of RM4,490 on the fact of the certificate. There is a manifest error.
- I (5) If this is correct, from the sum of RM34,637,871.26 a further sum of RM9 million is deducted the figures should leave a balance of RM25,637,470.26.
- (6) Our contention is that the Certificate of Indebtedness itself is not accurate in the first place by an increase sum of RM4,490 and secondly it lacks to show what happened to the RM9 million which

was due to collect from the purchaser to the tenderer of the said company. This manifest error cannot be rectified by any other documents because the Certificate of Indebtedness is the one document that can clearly show the liability of the defendants.

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Reply by Mr Adrian Hii for the plaintiff:

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- (1) The sum of RM17,226,618.74 was the net sum after the special administrators had paid the essential creditors who are entitled to priority of payment under the terms of the Workout Proposal. The further sum of RM9 million is not sum due from Pharmaniaga the purchaser of the shares but from pre-existing creditors of the borrower. Under the terms of the Workout Proposal Pharmaniaga is to collect those debts from the creditors on behalf of the borrower. See Enclosure 7 page 235 of the Exhibit 'DUSB-4' that is the Workout Proposal. The special administrators paid the net sum of RM17,226,618.74 to the plaintiff and accordingly there is a shortfall of RM34,637,871.26. As far as the plaintiff is concerned, it has taken into account the sum that it has received from the special administrators.

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FINDINGS AND DECISION

[6] Having heard the submission of the parties and considered the facts of the case as per pleading it is clear to me that summary judgment ought not to have been entered for the following reasons:

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- (1) The crucial paragraphs of the plaintiff's affidavit which attempt to show that its claim is clear and therefore need not go for trial are set out in paras 12 and 16 which read:

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- 12 Pursuant to their powers under the Danaharta Act, the Special Administrators prepared a Modified Workout Proposal dated 12.8.2003 ('the Workout Proposal'), which was duly approved by Pengurusan Danaharta Nasional Berhad and the Plaintiff, as secured creditor of the Borrower. The debts of the Borrower were to be resolved as set out therein. A copy of the Workout Proposal dated 12.8.2003, is produced and shown to me marked as Exhibit 'DUSB-4'.

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- 16 The Workout Proposal has been implemented on 15.9.2003 and the Special Administrators were discharged on 8.10.2003. The Plaintiff has since only received RM17,226,618.74 pursuant to the Workout

A Proposal. A copy of the letter dated 7.10.2003 discharging the Special Administrators is produced hereto and shown to me marked as Exhibit 'DUSB-5'.

B It is clear that the two paragraphs did not specify clearly how the sum owed by the defendants as guarantors came to be computed. They merely refer to a statement of account and workout proposal. In order to compute how much is actually owed, one has to work through the workout proposal to determine the sums owed. Generally leave to defend should be given where there is reasonable ground for an enquiry or account in order to ascertain the amount recoverable. See *Contract Discount Corporation Ltd v Furlong & Ors* [1948] 1 All ER 274 as cited in *The Supreme Court Practice (UK) 1997* at p 162. It is not open to the plaintiff merely to mention that such and such an amount was owed to the plaintiff in a bare statement with reference to an account exhibited in the application and expect the court to go through that account to determine whether indeed such sums were accurately owed.

C (2) The plaintiff cannot rely on the finality certification cl 2 (p) of the guarantee as they were meant to apply between the guarantors and the original lender Bank Bumiputra. Given the interference by Danaharta (albeit legally under the Act) the amount certified would have to include amounts incurred after the debt was purchased by Danaharta which was not within the contemplation of the parties when they signed the letters of guarantee and indemnity.

D (3) Triable issues notwithstanding, a defendant should nevertheless have leave to defend if he satisfies the court under O 14 r 3(1) that 'there ought for some other reason to be a trial of the claim or part of the claim'.

E [7] Circumstances which might afford 'some other reason for trial' includes cases:

F 'where the claim is of a highly complicated or technical nature which could only be properly understood if such evidence is given, or if the plaintiff's case tended to show that he had acted harshly and unconscionably and it is thought desirable that if he were to get judgment at all it should be in the full light of publicity' per Cairns LJ in *Bank fur Gemeinwirtschaft Aktiengesellschaft v City of London Garages & Ors* [1971] 1 WLR 149 at p 158 as cited in *The 1997 Supreme Court Practice (White Book)*.

G [8] There is 'some other reason' why there ought to be a trial in the instant case. The defendants' liability, it must be noted, arose purely from the joint and several guarantees of loans given to Bank Bumiputera which were

subsequently 'acquired' by Danaharta and thereafter managed by the appointed special administrators. The statutory acquisition and the appointment of the special administrators were certainly not in their minds and not what they had bargained for under the joint and several guarantees that they had signed. It is true that for the purpose of this application for summary judgment the plaintiff may be able to say that its claim is non triable by relying on s 55 of the Act which provides that 'any payment made, transaction entered into, or any other act or thing done in good faith by or with the consent of the special administrators is valid and effective for the purpose of this Act and shall not be void or voidable, nor be considered as an undue preference in the winding up of the affected person'. But s 55 does not exempt the plaintiff from justifying the transactions that it had undertaken after its acquisition to provide a complete and detailed account of how the sum of RM34,637,871.26 was arrived at. The acquisition by the plaintiff of the assets of Safire and the appointment of the special administrators to administer its assets have rendered the co-extensive liability of the defendants so much more technical and complicated. They cannot be explained and understood merely by the brief statement of account (exh 'DUSB-7') wherein without more only the opening balance, the repayments and the closing balance are stated.

[9] The defendant guarantors are entitled to a detailed account and explanation of how the sum claimed is arrived at which can only be done in a full trial.

[10] The appeal is allowed with costs.

Appeal allowed with costs.

Reported by Kohila Nesan

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